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7 IN THE UNITED STATES DISTRICT COURT  
8 FOR THE EASTERN DISTRICT OF CALIFORNIA  
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10 MERRICK JOSE MOORE,

11 Plaintiff,

No. CIV S-04-0763 GEB KJM P

12 vs.

13 S. SALENGER, et al.,

FINDINGS AND RECOMMENDATIONS

14 Defendant.  
15 \_\_\_\_\_/

16 Plaintiff is a California prisoner proceeding pro se with a complaint alleging  
17 violations of his Eighth Amendment rights. Defendants Bishop, Jackson, Moore, Norton,  
18 Quezada, Everett, Look, Salenger and Cornish have filed a motion to dismiss plaintiff's  
19 complaint on the basis that plaintiff failed to exhaust administrative remedies prior to filing his  
20 complaint. Upon review of the documents in support and opposition, and good cause appearing  
21 therefor, THE COURT FINDS AS FOLLOWS:

22 A motion to dismiss for failure to exhaust administrative remedies prior to filing  
23 suit arises under Rule 12(b) of the Federal Rules of Civil Procedure. Wyatt v. Terhune, 315 F.3d  
24 1108, 1119 (9th Cir. 2003). In deciding a motion to dismiss for a failure to exhaust non-judicial  
25 remedies, the court may look beyond the pleadings and decide disputed issues of fact. Id. at

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1 1120. If the district court concludes that the prisoner has not exhausted non-judicial remedies,  
2 the proper remedy is dismissal of the claim without prejudice. Id.

3           The Prison Litigation Reform Act provides that “[n]o action shall be brought with  
4 respect to prison conditions under section 1983 of this title, . . . until such administrative  
5 remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). California prison regulations  
6 provide administrative procedures in the form of one informal and three formal levels of review  
7 to address plaintiff’s claims. See Cal. Code Regs. tit. 15, §§ 3084.1-3084.7. Administrative  
8 procedures generally are exhausted once a prisoner has received a “Director’s Level Decision,”  
9 or third level review, with respect to his issues or claims. Cal. Code Regs. tit. 15, § 3084.5. All  
10 steps must be completed before a civil rights action is filed, unless a plaintiff demonstrates a step  
11 is unavailable to him; exhaustion during the pendency of the litigation will not save an action  
12 from dismissal. McKinney v. Carey, 311 F.3d 1198, 1200 (9th Cir. 2002). Defendants bear the  
13 burden of proving plaintiff’s failure to exhaust. Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th  
14 Cir.), cert. denied sub nom, Alameida v. Wyatt, 540 U.S 810 (2003).

15           Defendants have provided evidence indicating that plaintiff filed a prisoner  
16 grievance with respect to some of his claims prior to filing suit. Mot., Ex. A, Attach. 2. The  
17 “Second Level Response” to the grievance was not issued until April 27, 2004, eleven days after  
18 plaintiff’s complaint was filed. Id., Ex. A, Attach. 4. The evidence presented to the court  
19 suggests plaintiff never sought Director’s Level Review with respect to the grievance. Id., Ex. A  
20 (Hanlon declaration).

21           In response to the above, plaintiff asserts that the exhaustion requirement found in  
22 42 U.S.C. § 1997e(a) is satisfied. He points out that his grievance was “partially granted” at the  
23 first level of review and seems to suggest this excused him from proceeding through the rest of  
24 the grievance process. Opp’n at 4. This argument is undercut by the fact that plaintiff proceeded  
25 to the second level of review. In any case, plaintiff must exhaust all administrative remedies  
26 available to him. Plaintiff fails to provide anything suggesting the second and/or director’s levels

1 were no longer available to plaintiff after his grievance was partially granted at the first level.  
2 Defendants' motion, therefore, should be granted.

3 In accordance with the above, IT IS HEREBY RECOMMENDED:

- 4 1. That defendants' motion to dismiss be granted; and  
5 2. Defendants Bishop, Jackson, Moore, Norton, Quezada, Everett, Look, Salenger  
6 and Cornish be dismissed from this action.

7 These findings and recommendations will be submitted to the United States  
8 District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within  
9 fifteen days after being served with these findings and recommendations, any party may file  
10 written objections with the court and serve a copy on all parties. Such a document should be  
11 captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the  
12 objections shall be served and filed within five days after service of the objections. The parties  
13 are advised the failure to file objections within the specified time may waive the right to appeal  
14 the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

15 DATED: March 3, 2006.

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19 UNITED STATES MAGISTRATE JUDGE  
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